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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960

No. 1151

UNITED GAS PIPE LINE COMPANY,
Petitioner,
vs.
SCOTT PAPER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Appendix "A".

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On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Scott Paper Company, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

1) The United States Court of Appeals for the Fifth Circuit has not decided an important question of federal law which has not been settled by this Court, but rather has based its decision upon previous opinions involving the same or substantial-

ly the same questions heretofore rendered by this Court, and the decision of the U. S. Court of Appeals in the instant case is not in conflict with these decisions:

2) The U. S. Court of Appeals for the Fifth Circuit has not held the City of Mobile license tax ordinance unconstitutional or even invalid as repugnant to the Commerce Clause of the Federal constitution, but rather has held that, by the terms of the ordinance itself, the tax was invalidly applied to the gross receipts of a foreign corporation entirely engaged in interstate commerce within the State of Alabama and the City of Mobile.

3) This Court has previously, on many occasions, considered the validity of this type of license tax.

4) This Court has no jurisdiction to review the judgment in this case by writ of certiorari under the provisions of Title 28, Section 1254 of United States Code because the Petitioner herein, United Gas Pipeline Company, on January 24th, 1960, filed, in the United States Court of Appeals for the Fifth Circuit, its notice of appeal under the provisions of Title 28, Section 1254(2), United States Code. A copy of Petitioner's notice of appeal and statement of the federal questions presented is attached hereto and marked Appendix "A".

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit, dated September 2, 1960, is reported at 282 Fed. 2d 574, and its extended opinions denying petitions for rehearing are reported at 282 Fed.

2d 580, and are dated, respectively, October 5, 1960, and November 16, 1960.

PETITIONER'S STATEMENT OF JURISDICTION IS INACCURATE.

A glance at Appendix "A", a copy of the notice of appeal previously filed with the United States Court of Appeals for the Fifth Circuit which is attached hereto, will quickly disclose that the Petitioner herein has already made its election to seek a review by this Court of precisely the same questions which it now presents to this court by its petition. Title 28, Section 1254, United States Code, clearly envisions but one review by this Court of any judgment or decree of a Court of Appeals either by writ of certiorari or by appeal. Title 28, Section 1254, provides, in part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: *** (2) By appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented";

Thus the action of the Petitioner in filing its petition for the writ of certiorari is specifically precluded by the provisions of Paragraph 2, Section 1254, Title 28, United States Code.

QUESTION PRESENTED

The questions presented for consideration by

Petitioner are inaccurate and misleading:

The question presented this Court has been summarized accurately and succinctly by the United States Court of Appeals for the Fifth Circuit as follows:

> "The issue in these cases is whether a municipal license tax is applicable to the business of distributing natural gas to industrial consumers within the municipality's taxing jurisdiction, when such distribution is the terminal act of the transportation of that natural gas from without the state." **282 Fed. 2d 575.**

The Court then held that the tax was on the act or privilege of delivering gas in the city of Mobile and that delivery of the gas directly to industrial consumers in the City of Mobile is an integral part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce.

Thus, this Court is not called upon to consider whether, as suggested by Petitioner, a license tax on the privilege of selling natural gas is the equivalent of a tax on the preceeding interstate delivery or transportation of the gas.

STATEMENT OF FACTS

Petitioner's statement of the case, Page Four of the petition, is improper in that it is argumentative. Further, the petition does not set out in full the ordinance involved as required by Rule 23(d), but rather quotes only a paragraph of Section 1 of the ordinance which specifies the amount and meth-

od of measurement of the tax on gas companies. The applicable provisions of the ordinance are quoted by the United States Court of Appeals in its opinion beginning on Page 22, Appendix "A", of the Petition and continuing through Page 23, hence these are not repeated here. Further, because the opinion of the United States Court of Appeals contains an accurate statement of the facts in this case, no additional statement of facts is here attempted.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS AND ITS RATIONALE.

The Court of Appeals properly considered the license tax ordinance of the City of Mobile in its entirety. It held that the Mobile license tax is one which attaches to the privilege of entering the City of Mobile or its Police jurisdiction to do business therein and if such tax were applicable to the facts in this case it would be unconstitutional as conflicting with the Commerce Clause of the Federal Constitution. The Court rejected Petitioner's contention that the incidence of the tax was on the sale of gas within the City of Mobile.

> "In the course of its argument Appellee concedes that sale of the gas to industrial consumers in the circumstances of this case are interstate commerce, but argues that these interstate shipments are accompanied by local incidents subject to local taxation. But they fail to go on to meet the question before us, which is whether the City of Mobile has chosen to levy its tax on those local incidents, or whether it has chosen to directly tax the

flow of interstate commerce. Thus, Appellee contends that the City of Mobile could validly tax sales of gas by United to Scott and Ideal. That may be so. But the City has not attempted to tax United's sales made in Mobile, nor the "use" of the gas sold by United, nor United's property in Mobile." "One must comprehend . . . the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter, this Court has said, may sometimes be done. What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." **282 Fed. 2d 579, Appendix "A" to Petition at Page 26.**

However, the Court had previously said:

"No question of the total unconstitutionality of the Mobile ordinance is presented, since the ordinance contains a saving clause which reads as follows: 'No provision of this code shall be applied: (a) so as to impose any lawful tax or unlawful burden on interstate commerce or on any activity of the State or Federal Governments . . .'." **282 Fed. 2d 575, Appendix "A" to Petition at Page 20, Footnote 3.**

Thus, the Court's holding was:

"Since the Mobile City license tax was inapplicable to sales of gas by United to Ideal and Scott, the District Judge erred when he granted Summary judgment for United." **282 Fed.**

2d 580, Appendix "A" to Petition at Page 28.

We have seen how petitioner, by drawing this Court's attention to Paragraph 193 of Subsection 4, Section 1 of the ordinance, would have this Court restrict the operation of the statute to the selling or distributing of natural gas. But the Paragraph in question merely states the rate of tax and its method of measurement with respect to gas companies. The quoted language of Section 1 of the ordinance makes it quite clear that the ordinance is much broader in its scope, and purposely so, in order to make the procurement of a license a precondition for engaging **in any** of the enumerated activities within the City. The fact that the tax is measured by gross receipts is not inconsistent with its being a tax on the privilege of doing business. **Railway Express Agency, Inc. v. Commonwealth of Virginia, 347 U. S. 359, 98 L. Ed 757 (1954).**

Further, it appears conclusively that the Mobile Gas Service Corporation, which transported the gas as United's agent, made no sales to Scott and Ideal and yet properly paid the tax to the City of Mobile based on its gross receipts for making deliveries. This is so because the Mobile Gas Service Corporation is manifestly engaged in intrastate commerce and would require a license from the City of Mobile in order to engage in such business. This Court has often said that where a company is engaged in both interstate and intrastate business a State (or municipal corporation) may impose taxes even though the payment may come out of the funds derived from the taxpayer's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the power of the State and non-discriminatory.

Of necessity, the Court of Appeals based its decision in large measure on the holding of this Court in the case of **Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed 573 (1951)** wherein this Court said, at pages 608, 609, 610:[1]

> "The incidence of the tax provides the answer. The Courts of Connecticut have held that the tax before us attaches solely to the franchise of Petitioner to do interstate business. * * *
> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was **exclusively** interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the State. Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 68 L. Ed. 916, 44 A.L.R. 1219 (measured by percentages of "corporate excess" and net income); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 669 et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (1621) (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 442, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit (329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265), supra.

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[1] Citations to United States Supreme Court cases are from United States Reports.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a State may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the State, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, (337 U. S. 662, S. Ct. 1264, 93 L. Ed. 1613), supra; International Harvester Co. v. Evatt, 329 U. S. 416, 67 S. Ct. 444, 91 L. Ed. 390; Atlantic Lumber Co. v. Commissioner of Corporations and Taxation, 298 U. S. 553, 56 S. Ct. 887, 80 L. Ed. 1328."

The Lower Court also based its opinion upon this Court's ruling in **Railway Express Agency, Inc. v. Commonwealth of Virginia, supra,** wherein the Railway Express Agency was admittedly doing entirely interstate business and this Court said at Page 367, 368:

". . . It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross revenue tax in

every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. **It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.** Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508; Memphis Steam Laundry Cleaners, inc. v. Stone, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 7 L. Ed. 463, 50 S. Ct. 111." **Emphasis supplied.**

The Petitioner has admitted both in the District Court and in the Court of Appeals that it is exclusively engaged in interstate commerce within the City of Mobile, but has argued that certain decisions of this Court relating to the application of the Natural Gas Act, 15 U. S. C. 717, and the powers of states to regulate sales of gas where there are present certain local incidents, require the conclusion that what a state or municipal corporation may regulate it may also tax. This contention was rejected by the Court of Appeals. See **Michigan-Wisconsin Pipe Line Co. v. Calvert 347 U. S. 157, 92 L. Ed. 583 (1954).**

THE HOLDING OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT

The holding in the instant case is not in conflict with the decisions of this Court in the following cases: **Pennsylvania Gas Company v. Public Service Commission, 252 U. S. 23, 64 L. E. 434 (1920); East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 75 L. Ed. 1171 (1931); Memphis Gas Company v. Beeler, 315 U. S. 649, 86 L. Ed. 1090 (1942); Panhandle Eastern Pipe Line Company v. Public Service Commission, 332 U. S. 507, 92 L. Ed. 128 (1947); Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U. S. 329, 95 L. E. 993 (1951).**

In Pennsylvania Gas Company v. Public Service Commission, supra, the gas company transported gas from Pennsylvania into New York where it sold and delivered the gas at retail to local consumers who were supplied from a main by pipes laid through streets. The sole question involved in this case was the power of the Public Service Commission to **regulate local sales** of gas. The Court held that the transmission, sale and delivery of the gas was interstate commerce, saying, at Page 28, 29:

> "We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principle of the cases already determined by this court. West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. Ed 716, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564; Haskell v. Kansas Natural Gas Co.

224 U. S. 217, 56 L. Ed. 738, 32 Sup. Ct. Rep. 442; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. Ed. 1006, 1 A.L.R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 38.

"... In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single, and is, in our opinion, a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the states dealing with matters of the character of the one now before us."

In 1931 this Court rendered its decision in East Ohio Gas Company v. Tax Commission of Ohio, supra. This case apparently held that where the pressure of gas was reduced before delivery, this pressure reduction was analogous to the breaking of an original package, after shipment in interstate commerce, and hence, that the furnishing of gas at reduced pressures by East Ohio Gas Company was not interstate commerce, but rather a business of purely local concern exclusively within the jurisdiction of the State.

The East Ohio Gas case, while it dealt with taxation rather than regulation, as in Pennsylvania Gas Company, has not been followed by this Court in later cases, and indeed, as we shall see, this Court later repudiated the so-called pressure reduction test

on which it based, at least in part, its holding in East Ohio.

But in any event, the East Ohio Gas Company case can be distinguished from the instant case in at least two particulars. First, East Ohio was an Ohio corporation which received at least twenty-five per cent of its gas from its own wells located within the State of Ohio, clearly intrastate commerce, and, second, the gas company was engaged in the business of furnishing natural gas under local franchises in more than fifty municipalities in Ohio.

Even in 1931, this Court held, in **State Tax Commission of Mississippi v. Interstate Natural Gas Company, Inc., 284 U. S. 41, 76 L. Ed. 156** that a natural gas company engaged in transporting, selling and delivering gas to local distributing companies for resale was engaged in interstate commerce, and that hence a state privilege tax was unenforceable even though the pressure of the gas was reduced by Interstate Natural Gas Company before it passed into the purchasers' hands.

Memphis Gas Company v. Beeler, supra, involved a corporation organized elsewhere, but licensed by the State of Tennessee to do business therein. Memphis Gas Company had a franchise from the City of Memphis and maintained its principal office in Memphis where it managed its business. A Tennessee tax on net earnings arising from business done wholly within the State was upheld by this Court against the contention that the activity of Memphis Gas Company constituted only an interstate sale to distributors. Under the facts of this case, the Supreme Court of Tennessee had held that Memphis

Gas Company had entered into a profit-sharing contract with a local company to distribute gas within the City of Memphis and that this contract constituted a joint enterprise. This Court accepted the finding of the Supreme Court of Tennessee with regard to this point, and said, at Page 656:

> "Taxpayer's contributions to the joint undertaking with the Memphis Company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying the gas to be distributed for the joint account as required by the Memphis Company and in safeguarding and securing payments of its share of the profits went beyond a mere sale, to a distributor, of gas in interstate commerce."

As in the East Ohio case there were present activities on the part of the taxpayer which were clearly separable from the flow of interstate commerce.

The question presented in Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra, the first Panhandle case, was whether the Public Service Commission of the State of Indiana might **regulate** sales of gas by Panhandle Pipe Line Company direct to industrial consumers. Against the contention that the Natural Gas Act, supra, precluded such regulation, this Court held that sales to the local distributing companies, the municipalities, and the large industrial consumers were all sales in interstate commerce, but that simply because of its election to regulate sales to distributors for resale, Congress had not placed under the control of the Federal Power Commission the

regulation of direct sales to industrial consumers. Such regulation was reserved to the states.

This Court repudiated the so-called pressure reduction test applied in the East Ohio case saying, at Page 513:

> "Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the state's regulatory powers under the Commerce Clause. C. F. Interstate Natural Gas Company v. Federal Power Commission, 331 U. S. 682, 689, 91 L. Ed. 1742, 1747, 67 S. Ct. 1482. These sales here were clearly in interstate commerce."

This holding was reaffirmed in Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission, supra, the second Panhandle case.

Petitioner has used the terms regulation and taxation almost interchangeably but it does not follow that what a state or municipal corporation may regulate under its Police power it may also tax. This Court, in **Freeman v. Hewitt, 329 U. S. 249, 91 L. Ed. 265 (1946), said at Page 253:**

> "The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at

such taxation have always been more carefully scrutinized and more consistently resisted than Police powers of regulations of aspects of such commerce * * *."

In **Mississippi River Fuel Corp. v. Hoffman, 4 Ill. 2d 468, 123 N. E. 2d 503 (1955), cert. den. 349 U. S. 935, 99 L. Ed. 1264 (1955)**, the Illinois Supreme Court, in considering a gross receipts tax which the state sought to impose on a pipeline company, accurately analyzed the Panhandle cases, holding that sales of gas made in a manner almost identical with that of the instant case were not subject to the tax. That Court said:

> "Appellants have allowed themselves to become confused between interstate commerce in its constitutional aspect and that part of interstate commerce which Congress chose to take under Federal regulation by the Federal Natural Gas Act of 1938, 15 U. S. C. A., Sections 717 et seq. In that act Congress gave to the Federal Power Commission power to regulate rates and all other aspects of sales of gas by interstate pipelines to purchasers for resale, the purchasers being, in general, local public utility companies. But in that act, Congress refrained from giving to the Federal Power Commission power to regulate the rates for gas sold by interstate pipelines to customers who took gas for their own use. (See Panhandle case.) **But this statutory distinction which Congress elected to make certainly did not mean, as appellants seem to deduce, that the sales for resale were sales in interstate com-**

merce while the sales to industries for their own use were not. Jurisdiction over both types of sales could without question have been given by Congress to the Federal Power Commission had it chosen. It was because of this statutory choice, by Congress, that the Panhandle case quoted from above was decided as it was. The quoted language from the opinion in that case shows as plainly as possible that the United States Supreme Court fully recognizes the interstate character of industrial gas sales such as are here involved. The very recent case of Phillips Petroleum Co. v. State of Wisconsin, 347 U. S. 672, 74 S. Ct. 794, decided June 7, 1954, accords in principle with the Panhandle decision. There it was held that the Phillips Petroleum Company in selling gas to an interstate pipeline, was doing an act which amounted to participation in interstate transportation of gas and hence was subject to the Federal Power Commission. The late case of Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, is in principle the same. It also was a case where a local producer of gas introduced it into an interstate pipeline. The court held a Texas State tax on the gathering of the gas to be invalid as a burden on the interstate transaction of selling and delivering the gas to the pipeline. The Court said, 74 S. Ct. at Page 401, 'The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful de-

sire to require that interstate business bears its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause. **It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it.** Memphis Natural Gas Co. v. Stone, 1948, 335 U. S. 80, 87, 68 S. Ct. 1475, 1478, 92 L. Ed. 1832; Western Live Stock v. Bureau of Revenue, supra, 303 U. S. (250, at page 258, 58 S. St. (546), at page 550 (82 L. Ed. 823). And if a genuine separation of the taxed local activity from the interstate process is impossible; it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.' Puget Sound Stevedoring Co. v. Tax Commission, 1937, 302 U. S. 90, 58 S. Ct. 72, 82 L. Ed. 68, in which the Court held that the act of loading or unloading of goods at the

beginning or end of an admittedly interstate or foreign act of transportation of a cargo is a part of the transportation itself and cannot be taxed by the State in which the act is done. The Court said: 'The business of appellant, insofar as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce. **Transportation of a cargo by water * * is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. * * The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts.** 302 U. S. at pages 92, 94, 58 S. Ct. at pages 73, 74." 123 N. E. 2d at 506, 507. Emphasis Supplied.

Petitioner, on page twenty of its brief, makes the point that the City allows Petitioner to transport "vast quantities" of gas, free of tax, through the City either to the distributor for resale or enroute to the City of Pensacola, Florida. In the first instance, even Petitioner would concede that sales to distributors for resale are interstate commerce and not subject to tax, and in the second, the tax is measured by gross receipts and none are realized upon the gas destined to Florida.

On the same page Petitioner contends that the Spector Motor Service, and Railway Express cases are not in point because they involve common carriers whereas United sells the gas it carries and its revenues are from sales and not from transporta-

tion. Although, undoubtedly, United computes some charge for transportation which it includes in the sale price of the gas, this Court held in State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., supra, that Interstate Natural Gas Co., which both transported and sold its gas, was entirely engaged in interstate commerce. In Panhandle Eastern Pipeline Co. v. Public Service Commission, supra, at Page 513, this Court said:

> "Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and **as to sale**, in interstate merce." Emphasis supplied.

This was the holding in Mississippi River Fuel Corp. v. Hoffman, supra; Texas Gas Transmission Co. v. Atkin, 197 Tenn. 123, 270 S. W. 2d 348 (1954), cert. den. 348 U. S. 883 (1954); Gay v. United Gas Pipe Line Co., 159 Fla. 659, 32 So. 2d 600 (1947); and State v. Transcontinental Gas Pipe Line Corp., 123 So. 2d 172 (1960).

In Gay v. United Gas Pipe Line Co., Petitioner, which was on the other side of the fence with respect to a Florida gross receipts tax, persuasively and successfully urged that it was exclusively engaged, both as to sale and transportation, in interstate commerce. In State v. Transcontinental in which certiorari to the Supreme Court of Alabama was recently denied by this Court, the Alabama Court rejected the State's contention that Transcontinental, because it sold the gas it transported, was subject to the Alabama Franchise Tax, saying:

> ". . . The trial Court was of the opinion, and we are agreed, that commerce is not limited

> to transportation. In the language of the trial Court: 'Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce'." 123 So. 2d at 177.

Finally, Petitioner urges that the decision of the Court of Appeals is in conflict with **McGoldrick v. Berwind-White, 309 U. S. 33, 84 L. Ed. 565 (1940)**, and **International Harvester v. Department of Treasury, 322 U. S. 340, 88 L. Ed. 1313 (1943)**. Neither of these cases involves a license as a precondition of doing business.

McGoldrick involved a sales tax imposed upon the purchaser of tangible goods for consumption. This Court was careful to point out the distinction between the McGoldrick situation and that of a case such as the one here of which the Court says, in Footnote 2, Page 45:

> "Privilege taxes requiring a percentage of the gross receipts from interstate transportation, or from other activities in carrying on the movement of that commerce, which, if sustained, could be imposed wherever the interstate activity occurs, have been struck down for similar reasons. * * * Taxation of articles in the course of their movement in interstate commerce is similarly foreclosed."

International Harvester involved a corporation which, while incorporated in Delaware, maintained extensive factories in Indiana and manufactured, sold and delivered the bulk of its goods in the State of Indiana. The International Harvester situation is in many ways similar to that of Memphis Gas

Company, in Memphis Gas Company v. Beeler, supra. In both of these cases the activities of taxpayer were sufficiently separable from the flow of interstate commerce to sustain the tax involved. This Court said, at Page 346:

> "The present tax to be sure is on the seller. But in each a local transaction is made a taxable event, and that event is separate and distinct from the transportation or intercourse which is interstate commerce."

One of the contentions of International Harvester had been that in some instances delivery was taken by out of state purchasers in Indiana and such purchasers had then shipped the goods so purchased out of state.

THIS COURT HAS PREVIOUSLY DEALT WITH TAXES OF THIS TYPE

This Court has, on many occasions, dealt with license and franchise taxes of various kinds and with taxes on gross receipts or gross revenues. The following is a partial list of such cases:

Alpha Portland Cement Co. v. Commonwealth of Massachusetts
268 U. S. 203, 68 L. Ed. 916 (1925);
Ozark Pipe Line Corp. v. Monier
266 U. S. 555, 69 L. Ed. 439 (1925);
Puget Sound Stevedoring Tax Commission
302 U. S. 90, 82 L. Ed. 68 (1937);
Freeman v. Hewitt, supra;
Joseph V. Carter & Weekes Stevedoring Co.
330 U. S. 442, 91 L. Ed. 993 (1947);
Railway Express Agency, Inc. v. Commonwealth of Virginia, supra.

Joseph v. Carter & Weekes Stevedoring Co. involved a privilege tax imposed by the City of New York by ordinance which is substantially the same as that imposed by the City of Mobile. In this case, both of the respondents were engaged in the general stevedoring business in New York City and this Court found that this consisted only of taking freight from a convenient place on the pier of lighter, wholly within the territorial limits of New York City; and storing it properly for safety, and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival. The City of New York, acted under the purported authority of the local law which imposed a tax as follows:

> "for the privilege of carrying on or exercising for gain or profit within the City any trade, business, profession, vocation or commercial activity other than a financial business * * * Every person shall pay an excise tax which shall be equal to one-tenth of one per cent upon all receipts received in and or applicable to the City from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence * * *".

This Court called this a tax on the privilege of engaging in interstate commerce and found it "indistinguishable" from that involved in Puget Sound Stevedoring v. Tax Commission, supra. We submit that this tax, as well as that sought to be imposed by the State of Washington in the Puget Sound case are indistinguishable from the City of Mobile license tax in the instant case.

APPEAL OR CERTIORARI?

It has often been said of this Court that one of its problems is the consumption of its time with matters that are not of great national interest or importance by improper or improvident attempts upon the part of members of the Bar to obtain review by this Court of decisions of lower Courts simply because of dissatisfaction with such rulings. That there should be a difference of opinion between this Court and members of the Bar with regard to the relative importance of cases is natural, but it was the purpose of the Act of February 13th, 1925, to lighten this burden by enlarging the purely discretionary review by writ of certiorari and by restricting the cases which may be directly reviewed on appeal as a matter of right. To this end we have the present Section 1254, Title 28, United States Code, the pertinent portion of which is quoted above. **Frankfurter and Hart, 47 Harv. L. Rev. 245, 271, Moore v. Fidelity and Deposit Company, 272 U. S. 317, 71 L. Ed. 273 (1926).**

The effect of the filing of the petition for the writ of certiorari, hard on the heels of the filing of a notice of appeal in exactly the same case and involving precisely the same question, is to increase the workload of this Court.

We contend that Petitioner has already made its election concerning the method by which it seeks review by this Court when it filed its notice of appeal in the United States Court of Appeals for the Fifth Circuit. If this Court may be forced, at a short time later, to pass upon precisely the same questions, then the petition and this brief in opposition thereto are simply matters which waste the

time of this Court. We submit, therefore, that for this reason alone, this petition for writ of certiorari ought to be denied.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals involved no new question and is not in conflict with the previous decisions of this Court. This Court has previously considered similar taxes on many occasions, and in addition the Petitioner has already elected to seek review by this Court by appeal rather than certiorari. The petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, S. Palmer Gaillard, Jr., one of the attorneys for Scott Paper Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of March, 1961, I served copies of the foregoing brief for Respondent in opposition on United Gas Pipe Line Company, Petitioner herein, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record, as follows:

E. DIXIE BEGGS
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Pensacola, Florida

GEORGE E. STONE, JR.
First National Bank Building
Mobile, Alabama

S. PALMER GAILLARD, JR.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 18,118

SCOTT PAPER COMPANY,
Appellant,

v.

UNITED GAS PIPE LINE COMPANY,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that United Gas Pipe Line Company, appellee in the above styled cause, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit originally dated September 2, 1960, and thereafter entered on November 16, 1960, (rehearings denied on October 5 and November 16, 1960) reversing the judgment of the United States District Court for the Southern District of Alabama dated September 25, 1959.

This appeal is taken pursuant to 28 U.S.C.A. § 1254, paragraph (2).

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and in-

clude in said transcript the following:

The original printed record in this Court

Argument and submission

Opinion of the Court

Judgment

Petition for rehearing and brief in support

Opinion on rehearing

Order denying rehearing

Second petition for rehearing and brief in support

Opinion-order denying second petition for rehearing

Motions by appellee to further stay mandates and to fix effective dates of judgment

Order of December 27, 1960, staying mandates and fixing effective date of judgment

This notice of appeal

III.

The following questions are presented by this appeal:

(1) Does the commerce clause of the Federal Constitution immunize an interstate pipe line company making direct sales of gas to industrial consumers in the City of Mobile from a city license tax on the privilege of conducting that business in the City?

(2) Is a license tax on the privilege of selling natural gas the equivalent of a tax on the preceding

interstate delivery or transportation of the gas?

GEORGE E. STONE, JR.,
First National Bank Building,
Mobile, Alabama

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By
E. Dixie Beggs
Attorneys for United Gas
Pipe Line Company

SAUNDERS GREGG
P. O. Box 1407
Shreveport, Louisiana
Of Counsel

I, E. Dixie Beggs, one of the attorneys for United Gas Pipe Line Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of January, 1961, I served a copy of the foregoing notice of appeal to the Supreme Court of the United States on the appellee, Scott Paper Company, by mailing the same in a duly addressed envelope,

with first-class postage prepaid, to its attorneys of record as follows:

MESSRS. GAILLARD, GAILLARD & SMITH
Annex, First National Bank Building
Mobile, Alabama
(Attention: Mr. Hardy B. Smith)

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